IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

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| AT&T CORP., | * | |
| Plaintiff, | * | |
| v. | * | Civil Action No. RDB-07-1603 |
| AARON NUDELL, *et al.*, | * | |
| Defendants. | * | |

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**MEMORANDUM OPINION**

This action arises out of a six-count Amended Complaint filed by Plaintiff AT&T Corp. against Defendants Aaron Nudell ("Nudell"), Global Link Communications LLC ("GLC") and David Saunders ("Saunders") (collectively "Defendants"). AT&T claims, *inter alia*, that the Defendants fraudulently utilized AT&T's services to generate profit for themselves. On June 19, 2007, this Court issued a Temporary Restraining Order ("TRO") enjoining the Defendants from engaging in the allegedly fraudulent activities. Defendants then consented to the conversion of the TRO into a Preliminary Injunction, dated June 25, 2007. Pending before this Court are Defendants' Motion to Dismiss Under Rule 12(b)(6) or, in the Alternative, for Dismissal or Stay Pending Primary Jurisdiction Referral (Paper No. 62) and Defendants' Motion for a Temporary Restraining Order and Preliminary Injunction (Paper No. 63).[1] The parties' submissions have been reviewed and no hearing is necessary. *See* Local Rule 105.6 (D. Md. 2008). For the

[1] Four other motions filed by the Defendants remain pending at this time: Motion for Leave to File Counterclaim (Paper No. 74), Motion for Leave to Interplead Third Party Defendants Rebecca L. Landers and Unkown Named Agents of the U.S. Postal Service (Paper No. 75), Motion for Leave to File an Amended Counterclaim (Paper No. 86), and Motion to Compel Discovery and Request for Hearing (Paper No. 95). These motions will be addressed in a subsequent opinion.

reasons that follow, both motions are DENIED.

## BACKGROUND

On June 19, 2007, this Court held a hearing on AT&T's Motion for a Temporary Restraining Order. After a full hearing, this Court entered a TRO, finding a likelihood of success on the merits of AT&T's fraud claims as to the Defendants' alleged fraudulent activities. Defendants then consented to the conversion of the TRO into a Preliminary Injunction, dated June 25, 2007. After a second hearing on November 29, 2007, this Court issued an Amended Preliminary Injunction on December 12, 2007.

Bound to accept all well-pleaded allegations as true, this Court has taken the following factual allegations largely from the Amended Complaint. *See Ibarra v. United States*, 120 F.3d 472, 473 (4th Cir. 1997). From July of 2005 to at least June 5, 2007, Aaron Nudell and David Saunders contracted with AT&T to procure residential long distance telephone services by entering into several successive Consumer Service Agreements ("CSA") for the AT&T Unlimited Plus Plan ("Unlimited Plan"). (Am. Compl. ¶ 12.) The terms and conditions of each CSA explicitly state that the Unlimited Plan is for residential use only and not available for resale. (*Id.* ¶ 48.)

AT&T alleges that once the Unlimited Plans were purchased, Nudell and Saunders obtained up to three additional phone lines for each account—the maximum allowed by AT&T. (*Id.* ¶ 22.) In total, Nudell and Sanders have allegedly used various aliases[2] and residential

[2] The names Aaron Nudell has allegedly used in entering the CSAs at issue include, but are not necessarily limited to: Ari Nudell, Arie Nudell, Ary Nudell, Morris Nudell, Arie Nugell, Morris Nutell, Rabbi Annette & Nudell, Ariee Mudell, Nudel Ary, and Arie Nedell. (Am. Compl. ¶ 18.) Saunders has allegedly used the name Saunders, Inc. in addition to his own. (*Id.* ¶ 19.)

addresses[3] to procure more than one hundred telephone lines. (Am. Compl. ¶¶ 17-22.) AT&T asserts that it would never have suspected any fraudulent activity until Nudell called AT&T customer service and complained about a $13,000 telephone bill.[4] (*Id.* ¶ 24.) Moreover, AT&T discovered that Saunders may have been involved when it conducted a call pattern analysis in June and July of 2007, which indicated similar, if not identical, calling patterns on his part. (*Id.* ¶ 28.)

In addition to using false names to create over one hundred Unlimited Plan accounts, it is alleged that Nudell and Saunders fraudulently generated access fees and provided the AT&T Unlimited Plans to Defendant Global Link Communication LLC[5] for resale to consumers. (*Id.* ¶ 30-32.) Defendant GLC is a competitive local exchange carrier that purchases "network elements" from the incumbent local carrier, Verizon, to then "provide its own retail services" locally. (*Id.*) In addition, GLC allegedly provides retail long-distance service to its customers using the fraudulently-obtained residential AT&T Unlimited Plans, as described above. (*Id.*) Furthermore, allegedly once the residential accounts were set up and the account carried minutes

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[3] Some of the various residential addresses that Nudell and Saunders used in combination with false names include, but are not necessarily limited to: P.O. Box 15121, Pikesville, MD 21282; b) 3821 Labyrinth Road, Baltimore, MD 21215; 3821 Labryian Road, Baltimore, MD 21215; 3712 Glen Avenue, Baltimore, MD 21215; 3320 Clarks Lane Apt. D, Baltimore, MD 21215, and 300 Reisterstown Road Suite 100, Pikesville, MD 21208. (Am. Compl. ¶¶ 20-21.)

[4] Defendant Nudell called to complain that a $13,000 invoice was incorrectly priced because the account at issue was supposed to be an Unlimited Plan. (Am. Compl. ¶ 24.) While customer service credited the account, the AT&T computer systems alerted the appropriate fraud departments to investigate in light of the extremely high usage of minutes. (*Id.* ¶¶ 25-26.) Plaintiff alleges that, but for Nudell's complaint and the $13,000 credit, Defendants' scheme could have remained undetected indefinitely. (*Id.* ¶ 26.)

[5] Defendant Nudell is the Chief Executive Officer of Global Link Communications LLC, and Defendant Saunders is an independent contractor performing technology repair services for the company. (Am. Compl. ¶¶ 7, 9.)

of usage, GLC then billed AT&T access fees for both origination and termination access to the GLC-owner or operated lines. (*Id.* ¶ 34.) In order to increase these access fees, Defendants allegedly "devised a scheme that continually makes long distance calls between Nudell and GLC phone numbers in a loop, thereby fraudulently generating origination and termination access fees payable to GLC by AT&T."[6] (*Id.*) In total, AT&T contends that it has paid GLC at least $354,320 as a result of GLC's alleged fraudulent activities, with the last payment on June 12, 2007. (*Id.*)

On June 18, 2007, Plaintiff AT&T filed a six-count Complaint against Defendants Aaron Nudell and Global Link Communications LLC (Paper No. 1), as well as an Emergency Motion for a Temporary Restraining Order and Preliminary Injunction (Paper No. 2). On June 19, 2007, this Court held a hearing and granted AT&T's motion for a TRO (Paper No. 6). Upon consent of the parties, the TRO became a Preliminary Injunction on June 25, 2007. (Paper No. 10.)

Subsequently, on August 22, 2007, Plaintiff filed an Amended Complaint (Paper No. 26), adding David Saunders as a Defendant. In Count I (Breach of Contract), Count II (Fraudulent Inducement) and Count III (Fraud), Plaintiff alleges that Defendants Nudell and Saunders fraudulently entered into Consumer Service Agreements ("CSA") for Unlimited Plan Residential Accounts ("Unlimited Plan") with Plaintiff, and that Defendants breached those CSAs by using the Unlimited Plan for an unlawful, abusive, or fraudulent purpose. (Am. Comp. ¶¶ 45-67.) In Count IV (Conversion), Plaintiff alleges that Defendant GLC fraudulently acquired vast quantities of AT&T's long distance network and, in turn, resold the network capacity and

[6] As of the filing of the Amended Complaint on August 22, 2007, AT&T allegedly received forty-nine invoices from GLC for fraudulent access fees based upon minutes of usage associated with residential accounts. (Am. Compl. ¶ 35.)

functionality to GLC's own customers. (*Id.* ¶¶ 69-70.) In Count V (Unjust Enrichment), Plaintiff alleges that all three Defendants perpetrated a fraudulent scheme that resulted in the taking of long distance services and minutes as well as almost $355,000 from AT&T. (*Id.* ¶ 75.) In Count VI (Preliminary Injunction), Plaintiff requests a temporary and permanent injunction on the grounds that it will likely continue to be harmed by Defendants' alleged fraudulent scheme. (*Id.* ¶¶ 82-88.)

On November 21, 2007, AT&T filed an Emergency Motion for an Order of Civil Contempt and Contempt Sanctions (Paper No. 43), alleging that the Defendants had violated this Court's June 25, 2007 Preliminary Injunction. A hearing was held on November 29, 2007, and this Court denied the Plaintiff's motion but subsequently issued an Amended Preliminary Injunction on December 13, 2007 (Paper No. 57).

On January 18, 2008, Defendants filed a Motion to Dismiss or, in the Alternative, for Dismissal or Stay Pending Primary Jurisdiction Referral (Paper No. 62) contending that: (1) AT&T fails to state a claim upon which relief may be granted because its claims are precluded by the filed rate doctrine; and (2) Plaintiff's Complaint should be dismissed because the Federal Communications Commission ("FCC") has primary jurisdiction over the matter. In the alternative, Defendants have moved for the matter to be stayed pending referral to the FCC. Also on January 18, 2008, Defendants filed a Motion for Temporary Restraining Order and Preliminary Injunction (Paper No. 63) on the grounds that AT&T continued to bill them for phone lines terminated pursuant to this litigation.

Additional motions filed by Defendants that will be ruled on separately include a Motion for Leave to File Counterclaim (Paper No. 74), a Motion for Leave to Interplead Third Party

Defendants Rebecca L. Landers and Unkown Named Agents of the U.S. Postal Service (Paper No. 75), a Motion for Leave to File an Amended Counterclaim (Paper No. 86), and a Motion to Compel Discovery and Request for Hearing (Paper No. 95).

STANDARD OF REVIEW

**I. Motion to Dismiss**

Under Rule 12(b)(6) of the Federal Rules of Civil Procedure, a complaint may be dismissed for failure to state a claim upon which relief can be granted. Fed. R. Civ. P. 12(b)(6). A Rule 12(b)(6) motion tests the legal sufficiency of a complaint. *Edwards v. City of Goldsboro*, 178 F.3d 231, 243 (4th Cir. 1999). Therefore, the court accepts all well-pleaded allegations as true and construes the facts and reasonable inferences derived therefrom in the light most favorable to the plaintiff. *Ibarra v. United States*, 120 F.3d 472, 473 (4th Cir. 1997). A complaint must meet the "simplified pleading standard" of Rule 8(a)(2), *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 513 (2002), which requires only a "short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)).

Although Rule 8(a)(2) requires only a "short and plain statement," a complaint must contain "more than labels and conclusions" or a "formulaic recitation of the elements of a cause of action." *Bell Atl. Corp. v. Twombly*, 127 S. Ct. 1955, 1964-65 (2007). The factual allegations contained in a complaint "must be enough to raise a right to relief above the speculative level, on the assumption that all the allegations in the complaint are true (even if doubtful in fact)." *Id.* at 1965. Thus, a complaint must allege "enough facts to state a claim to relief that is plausible on its face." *Id*. at 1974.

**II. Motion for Temporary Restraining Order and Preliminary Injunction**

The following standard was applied by this Court when it issued a TRO against the Defendants on June 19, 2007. A motion for a TRO or preliminary injunction requires a balancing of four interests, as set forth in *Blackwelder Furniture Company of Statesville, Inc. v. Seilig Manufacturing Company, Inc.*, 550 F.2d 189 (4th Cir. 1977). The four *Blackwelder* factors are: 1) the likelihood of irreparable harm to the plaintiff if the TRO or preliminary injunction is denied; 2) the likelihood of harm to the defendant if the requested relief is granted; 3) the likelihood that the plaintiff will succeed on the merits; and 4) the public interest. *Id.* at 196. *See also Rum Creek Coal Sales, Inc. v. Caperton*, 926 F.2d 353, 359 (4th Cir. 1991). "The irreparable harm to the plaintiff and the harm to the defendant are the two most important factors." *Direx Israel, Ltd. v. Breakthrough Med. Corp*., 952 F.2d 802, 812 (4th Cir. 1991). However, "[i]f that balance is struck in favor of plaintiff, it is enough that grave or serious questions are presented; and plaintiff need not show a likelihood of success. *Blackwelder*, 550 F.2d at 196.

"[T]he 'plaintiff bears the burden of establishing that each of these factors supports granting the injunction.'" *Id.* The Defendants have now moved for a temporary restraining order and for a preliminary injunction. Accordingly, the parties' roles are simply reversed in the balancing test and Defendants have the burden of establishing that the factors weigh in their favor.

## ANALYSIS

### I. Motion to Dismiss

Initially, Plaintiff AT&T Corp. argues that Defendants Aaron Nudell, Global Link Communications, LLC and David Saunders waived their rights to challenge this Court's

jurisdiction by consenting to the conversion of the initial TRO against them into a preliminary injunction. (Pl.'s Mem. Opp'n Mot. Dismiss 4-5.) In support, Plaintiff cites an opinion in which this Court held that "the doctrine of primary jurisdiction, under which a court defers to an administrative agency for a particular finding, is waivable by simple failure to assert it." *CSX Transp., Inv. v. Transp.-Commcn's Int'l Union*, 413 F. Supp. 2d 553, 564 (D. Md. 2006). However, as noted by Defendants in their Reply, this Court orally granted them permission to file a Motion to Dismiss relating to jurisdiction issues during a telephone conference on January 3, 2008, and subsequently issued a Revised Scheduling Order establishing a briefing schedule for said motion. (*See* Paper No. 58.) Accordingly, this Court does not find that Defendants waived their right to raise the issue of primary jurisdiction by "failure to assert it."

In their Motion to Dismiss, Defendants argue that the Complaint should be dismissed because (1) Plaintiff's claims are precluded by the filed rate doctrine and primary jurisdiction, and (2) Plaintiff's Complaint does not cite a single case from the FCC or any other regulatory body to support its allegation that the conduct of the Defendants is unlawful. (Defs.' Mem. Supp. Mot. Dismiss 5.) In the alternative, Defendants contend that this case should be dismissed or stayed pending a primary jurisdiction referral because a decision by this Court "would require the Court to decide complex, novel issues of regulatory policy best determined, in the first instance, by the FCC." (*Id.*)

**A. Filed Rate Doctrine**

The gravamen of the Complaint is that Defendants have fraudulently utilized AT&T's phone services for profit. This Court has issued a TRO and two preliminary injunctions finding that AT&T is likely to succeed on the merits of its claims based, in part, on the testimony of the

Defendants themselves. Defendants argue, however, that Plaintiff's claims are barred by the filed rate doctrine because the claims seek to "usurp a function that Congress has assigned to a federal regulatory body." (Defs.' Mem. Supp. Mot. Dismiss 7 (quoting *Arkansas Louisiana Gas Company v. Hall*, 453 U.S. 571, 572 (1981)).)

The filed rate doctrine essentially states that common carriers are bound to the tariff schedules that they file with the federal agency overseeing the industry. *Bryan v. BellSouth Commcn's, Inc.*, 377 F.3d 424, 429 (4th Cir. 2004). The purpose behind the doctrine is "to prevent discrimination among consumers and to preserve the rate-making authority of federal agencies." *Id.* (citing *Hill v. BellSouth Telecomms., Inc.*, 364 F.3d 1308, 1316 (11th Cir. 2004); *Marcus v. AT&T Corp.*, 138 F.3d 46, 58 (2d Cir. 1998)). In the context of litigation, a court should defer to a regulatory agency if the court's award of damages would effectively impose a rate different from the dictated tariff, thus "usurp[ing] the [agency's] authority to determine what rate is reasonable." *Id.* at 430. However, if a court's decision would not affect the standard tariff, then the filed rate doctrine does not bar recovery.[7] It is clear to this Court that the substance of this case—Defendants' allegedly fraudulent activities—has no bearing on industry rates or specific tariff schedules.

Plaintiff likewise contends that the filed rate doctrine does not apply to its fraud claims against Defendants because such disputes have no bearing on tariffs. (Pl.'s Mem. Opp. Mot. Dismiss 7-8.) In support, AT&T cites *Buy This, Inc. v. MCI Worldcom Communications, Inc.*, 209 F. Supp. 2d 334 (S.D.N.Y. 2002), in which the court held that the filed rate doctrine did not

[7] Applicable to this case, tariffs must be filed by telecommunications providers with the Federal Communications Commission ("FCC") subject to criteria set forth in the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, *et seq.* ("Communications Act").

bar a fraud counterclaim by a telecommunications provider against a company that resold "free" promotional minutes for profit, because the company did not comply with the terms of the tariff and intentionally concealed its intent to resell the promotional minutes. Similarly, in this case, AT&T alleges not only that Defendants did not disclose their intention to resell and profit from AT&T's residential Unlimited Plans, but also that they fraudulently procured the lines in the first place by using false names and addresses. None of the claims in this case pertain to AT&T's filed rates.

Defendants raise two main arguments based on the two underlying policies of the filed rate doctrine: non-discrimination and non-justiciability. First, they claim that the filed rate doctrine applies in this case, because Plaintiff "has failed to pay its federally mandated tariffs to Defendants" and is therefore discriminating against them. (Defs.' Mem. Supp. Mot. Dismiss 9.) It appears this argument relates to the access fees generated by Defendant GLC, as the competitive local exchange carrier, during the alleged scheme. Defendants argue that if AT&T does not have to pay said fees for what they contend is lawful use of AT&T's services, this litigation would permit AT&T to discriminate in direct violation of the filed rate doctrine. The Defendants contend that this case requires this Court to "determine the reasonableness of paying lawful access fees." (*Id*. at 10.) Thus, Defendants essentially argue that AT&T should raise any disputes over the fees it has to pay to competitive local exchange carriers before the Federal Communications Commission. In support, they cite *In re Carolina Motor Express, Inc*., 949 F.2d 107, 110 (4th Cir. 1991), in which the Fourth Circuit held that "a defense attacking the reasonableness of a carrier's filed rates should not operate to stay enforcement of the filed rate doctrine. Rather, shippers must pay the filed rates and contest those filed rates before the ICC

independently if they wish to seek reparations from the carrier." However, prior to a determination by the ultimate trier of fact as to the allegations of fraud and misrepresentation in this case, Defendants cannot say with certainty that their use of AT&T's services were lawful and, therefore, misconstrue the nature of the claims in this case. Thus, Defendants' argument is without merit.

Defendants' second argument relates to the non-justiciability policy behind the filed rate doctrine, which essentially states that a regulatory agency has more expertise in assessing the reasonableness of rates and, therefore, should be the primary forum for disputes over rates. Defendants argue that the fraud and breach of contract claims are really about whether Defendants' use of AT&T's services was appropriate, an issue which should be decided by the FCC. However, rates are not at issue in this case. Rather, AT&T asserts that Defendants committed civil fraud, breach of contract, and other claims relating to those main causes of action.[8] Quite simply, this is a fraud case and the Defendants' arguments are without merit. Accordingly, the filed rate doctrine does not bar AT&T's claims.

**B. Primary Jurisdiction**

Defendants next argue that the case should be dismissed under the doctrine of primary jurisdiction, pursuant to which cases falling within the expertise of a regulatory agency are dismissed in deference to that agency. (Defs.' Mem. Supp. Mot. Dismiss 17.) It is clear, however, that fraud cases such as that at bar do not fall within the expertise of the Federal

[8] Defendants further argue that the contract, tort, and unjust enrichment claims are barred because the filed rate doctrine prohibits adjudication in courts over "terms governed entirely by filed tariffs." (Defs.' Mem. Supp. Mot. Dismiss 14 (citing *AT&T v. Central Office Telephone, Inc*., 524 U.S. 214, 227 (1998).) However, as noted above, the terms of the tariffs are not at issue, but rather Defendants' conduct.

Communications Commission.

This Court has previously held that the doctrine of primary jurisdiction "is grounded on the notion that 'in cases raising issues of fact not within the conventional experience of judges or cases requiring the exercise of administrative discretion, agencies created by Congress for regulating the subject matter should not be passed over.'" *Md. Port Admin. v. SS American Legend*, 453 F. Supp. 584, 592 (D. Md. 1978) (quoting *Far East Conference v. United States*, 342 U.S. 570, 574 (1952)). The doctrine "should be invoked sparingly, as it often results in 'added expense and delay.'" *Red Lake Band of Chippewa Indians v. Barlow*, 846 F.2d 474, 477 (8th Cir. 1988) (citation omitted).

Defendants argue that "[t]he FCC has the special expertise, and the authority, to ensure that a decision on this matter follows federal policies and results in regulatory uniformity within the telecommunications industry." (Defs.' Mem. Supp. Mot. Dismiss 19.) Defendants further note that AT&T would not be disadvantaged in any way because the issues would be resolved by the FCC and the right to appeal would still be available. (*Id*.) They point out that there are other pending cases in which AT&T alleges that a local exchange carrier committed fraud for similar practices and that many of those cases "have been referred to the FCC for primary jurisdiction determination." (*Id*. at 20.) In addition, they point to comments submitted by AT&T to the FCC recommending a rule change to prohibit local exchange carriers from engaging in schemes whereby they benefit from high access fees generated by end users in remote areas as proof that the issue is best addressed by the FCC. (*Id*. at Ex. 3.)

Plaintiff counters that this Court, not the FCC, is the appropriate forum for disposition of fraud and breach of contract. (Pl.'s Mem. Opp'n Mot. Dismiss 11.) Plaintiff cites *National*

*Communications Association v. AT&T Co.*, 46 F.3d 220, 222-23 (2d Cir. 1995), in which the Court of Appeals for the Second Circuit articulated four factors that courts should consider in determining whether deference to an agency under the doctrine of primary jurisdiction is appropriate: 1) whether the issue is within the conventional experience of judges or whether it involves technical or policy matters within the expertise of the agency; 2) whether the particular question at issue is within the agency's discretion; 3) whether there is a substantial danger of inconsistent rulings; and 4) whether the agency has already been contacted. Plaintiff argues that these elements weigh against dismissal of this case because its common law claims involve no technical or policy issues, but rather are fully within this Court's competence. (Pl.'s Mem. Opp'n Mot. Dismiss 12.) Plaintiff also argues that there is no risk of inconsistent rulings because its claims are based solely in state law, not the Communications Act or the tariffs governed by the Communications Act. (*Id*. at 13.) Finally, AT&T notes that no prior application to the FCC has been made in this particular case. Thus, it argues, the four factors weigh against application of the primary jurisdiction doctrine.

Considering the *National Communications Association* factors, it is clear to this Court that this particular case does not involve any highly technical or policy matters that would require deference to the FCC. Moreover, although related issues have apparently been addressed by AT&T previously both in federal courts and before the FCC, the particular facts of this case involve the allegedly fraudulent actions of the Defendants in procuring and utilizing AT&T's services for profit. Accordingly, the doctrine of primary jurisdiction is inapplicable to this case.

In the alternative, Defendants seek to stay these proceedings "'in deference to a parallel administrative agency proceeding.'" (Defs.' Mem. Supp. Mot. Dismiss (quoting *United States v.*

*Henderson*, 416 F.3d 686, 691 (8th Cir. 2005)).) Defendants contend this would permit this Court to retain jurisdiction while still affording the FCC deference and utilizing its expertise in addressing the claims. (*Id*. at 19.) However, as previously discussed, this case involves claims fully within the purview of this Court, such as common law breach of contract, fraud, and unjust enrichment. Accordingly, Defendants' alternative Motion to Stay is DENIED.

**D. Failure to State a Claim**

Finally, Defendants argue that Plaintiff has failed to state a claim against them because their actions were not fraudulent. (Defs.' Mem. Supp. Mot. Dismiss 20.) As noted previously, this Court has already granted a TRO and two Preliminary Injunctions to Plaintiff, finding that AT&T has a likelihood of success on the merits of its claims. It is clear to this Court that Plaintiff has sufficiently pled its Amended Complaint and that there are factual issues left to be determined by the trier of fact.

As to the allegations that they improperly generated access fees through a looping call mechanism, Defendants point to suggestions by AT&T to the Federal Communications Commission recommending rule changes to prevent local exchange carriers from taking advantage of the existing rules to "bilk hundreds of millions" and referring to similar schemes as "misbehavior." (*Id*. at 25-26, Ex. 3.) The Defendants argue that these recommendations prove that AT&T was aware of the legality of such schemes, which they suggest is the reason for AT&T's suggestion of FCC rule changes. (*Id*. at 26-28.) Defendants also argue that their actions "are minuscule in comparison to the actions deemed lawful by the FCC" such as "utilizing sexual-matter chat lines, [or] utiliz[ing] 'free' teleconferencing services. . . ." (*Id*. at 28.)

As to the allegations that Defendants provided false names and addresses to procure over 100 telephone lines, they claim that they never misrepresented their names, but rather AT&T representatives misspelled them or improperly failed to discontinue the previous user's name from the phone line. (Defs.' Reply 7; Nudell Aff. ¶¶ 3-4, 12-13.) This rather strained argument can be addressed by the jury at the trial of this case. The Defendants also note that Defendant Nudell provided his social security number each time—the ultimate proof of one's identity—and contend that this is further proof that he never intended to defraud AT&T. (Defs.' Reply 8.) Further, they contend that they did not misrepresent their intention to use the Unlimited Plan lines because they "have not utilized the long-distance phone service provided by AT&T as commercial customers, nor has AT&T conclusively shown this fact to be true." (*Id.* at 9.) Defendant Nudell states that whenever he called AT&T to set up a phone line, he specifically informed the representatives that he intended to profit from the line and that he planned to leave the phone off the hook all day and the representatives said that was fine. (Nudell Aff. ¶¶ 6-7.)

Plaintiff correctly notes that it pled the fraud claim with particularity, pursuant to Rule 9(b) of the Federal Rules of Civil Procedure, and that it has set forth "in excruciating detail" in the Complaint the facts supporting all of its claims. At the motion to dismiss stage, this Court must accept all well-pleaded allegations as true and construes the facts and reasonable inferences derived therefrom in the light most favorable to the plaintiff. *See Ibarra v. United States*, 120 F.3d 472, 473 (4th Cir. 1997). This Court finds that Plaintiff has sufficiently pled its claims and the arguments raised by Defendants are factual ones to be determined by the jury in this case.

Accordingly, Defendants' Motion to Dismiss Under Rule 12(b)(6) or, in the Alternative, for Dismissal or Stay Pending Primary Jurisdiction Referral is DENIED.

## II. Motion for Temporary Restraining Order and Preliminary Injunction

Defendants have moved for both a temporary restraining order and a preliminary injunction to enjoin Plaintiff from billing them for lines terminated prior to this Court's December 12, 2007 Amended Preliminary Injunction and Order (Paper No. 57). In support, they attach two bills and a collection statement. The first bill is addressed to "GLC" and is in the amount of $1,124.31, for the service period of December 6, 2007 to January 5, 2008. (*Id.* at Ex. 1.) The second bill is addressed to "Ari Nudell" and is in the amount of $325.74, also for the service period of December 6, 2007 to January 5, 2008. (*Id*.) The collection statement is addressed to a third name, "Ariee Mudell", and seeks to collect $59.19 on behalf of AT&T. (*Id.* at Ex. 2.) However the statement bears no date or any other indication as to what the $59.19 covered and, as such, cannot support Defendants' assertion that it sought to collect on a bill for services rendered after the termination of their phone lines. (*See id*.)

AT&T contends that the two invoices to which Defendants refer were for legitimate charges. (Pl.'s Mem. Opp'n Mot. TRO 3-3.) Specifically, it notes that the first bill in Exhibit 1 was for three phone calls placed on November 6, 2007, totaling over 4,000 minutes on phone lines that were accidentally not terminated by Verizon, as discussed during the motions hearing held November 29, 2007. (*Id*. at 3-4, Ex. C.) Plaintiff also points out that, while the second invoice in Exhibit 1 relates to an account that was, in fact, shut down on December 7, 2007, the invoice applied to charges that were up to 210 days old and already outstanding on the account. (*Id*. at 4, Exs. B, D.)[9] Finally, the collection notice was for an account that was not terminated

[9] This Court notes that, although the records provided by AT&T are for the same phone number (410-585-1047) as the second invoice provided by Defendants in their Exhibit 1, the names do not match. Specifically, the screen showing the termination date of the phone line as

until December 7, 2007. (*Id*. at 4, Ex. B.) Thus, Plaintiff argues that, because each of the fees was generated by Defendants' own use of phone minutes, it is entitled to bill Defendants for those fees.

In their Reply, Defendants attach additional copies of bills which they contend show current charges for fees incurred during the months of October and November of 2007. (Defs.' Reply Ex. 2.) The first two relate to the "Airee Mudell" account described above which incurred a $51.42 charge. The October 9-November 8, 2007 bill shows a monthly fee of $32.99 plus other charges for the following service cycle—November 8- December 7, 2007—totaling $51.42, with a due date of December 3, 2007. (*Id*.) The subsequent bill, dated November 9-December 8, 2007, shows that a late fee was charged on December 8, 2007, a day after the account was terminated, because the $51.42 had not been paid. (*Id*.) The final statement is for an "Ari Nudell" account, dated October 6-November 5, 2007, and reflects a previous balance of $240.26 plus new charges for the November 5-December 4, 2007 service period, totaling $282.68. (*Id*.) These bills reflect that the phone lines were still activated and incurring charges until their deactivation on December 7, 2007. Thus, AT&T's automatically generated fees were appropriately incurred prior to the termination of the lines, particularly because the monthly service fees are generated prior to the start of the service month.

As noted *supra*, the entry of either a TRO or a preliminary injunction is governed by the four-part balancing test set forth in *Blackwelder Furniture Co. of Statesville, Inc. v. Seilig Mfg.*

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December 7, 2007, lists "Aron Nudell" as the account holder (Pl.'s Mem. Opp'n Mot. TRO Exs. B, D), while the invoice for the same phone line lists "Ari Nudell" as the account holder (Defs.' Mot. TRO Ex. 1). However, this discrepancy has no bearing on this Court's TRO analysis, as the account is clearly the same.

*Co., Inc.*, 550 F.2d 189 (4th Cir. 1977). The four *Blackwelder* factors are: 1) the likelihood of irreparable harm to the plaintiff if the TRO or preliminary injunction is denied; 2) the likelihood of harm to the defendant if the requested relief is granted; 3) the likelihood that the plaintiff will succeed on the merits; and 4) the public interest.

As to the first element, Defendants claim they will be irreparably harmed financially because AT&T has continued billing them for phone lines they terminated as a result of this litigation and because their credit rating could be affected by the collection of said bills through an independent collection agency. (Defs.' Mot. TRO 4.) They further claim that they were unable to contact AT&T to contest the bills as a result of their "inability to respond pursuant to the Court's injunction. . . ." (*Id*. at 2.) AT&T aptly notes that neither of the Preliminary Injunctions issued by this Court gives Defendants any affirmative rights or mandates that AT&T cease billing for Defendants' phone minutes. (Pl.'s Mem. Opp'n Mot. TRO 3.) Plaintiff further notes that the injunctions do not prohibit Defendants from contacting AT&T. (*Id*.) Thus, because the bills were issued for minutes actually incurred by the Defendants, Plaintiff argues, Defendants will not be irreparably harmed by paying the fees if this Court does not issue a TRO. AT&T also notes that the accounts should not generate any new fees, as the lines have been terminated. (*Id*. at 6.) Thus, it is clear that Defendants will not be irreparably harmed if this Court denied its motion for a TRO.

As to the second element, Plaintiff is not likely to be harmed from any delay in receiving fees of less than $2,000 if the TRO were granted. The evidence shows that AT&T is not charging Defendants for the subject phone lines after their termination, but rather all fees were generated legitimately prior to the lines' deactivation.

Upon balancing those two factors, which the Fourth Circuit has held are the most important, *see Direx Israel, Ltd. v. Breakthrough Med. Corp*., 952 F.2d 802, 812 (4th Cir. 1991), Defendants are clearly not entitled to a TRO.

Even examining the remaining two elements, Defendants' request must be denied. The Defendants have moved to file a Counterclaim against AT&T,[10] but even an assertion of a counterclaim does not indicate any irreparable harm to the Defendants in being required to pay fees for service they utilized. Finally, there is simply no public interest served by delaying Defendants' payments to AT&T for phone services rendered.

Accordingly, Defendants' Motion for a Temporary Restraining Order and Preliminary Injunction is DENIED.

CONCLUSION

For the reasons stated above, Defendants' Motion to Dismiss Under Rule 12(b)(6) or, in the Alternative, for Dismissal or Stay Pending Primary Jurisdiction Referral is DENIED. In addition, Defendants' Motion for a Temporary Restraining Order and Preliminary Injunction is DENIED. A separate Order follows.

Date: July 30, 2008

/s/
Richard D. Bennett
United States District Judge

[10] This motion remains pending.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

| | | |
|---|---|---|
| AT&T CORP., | : | |
| | : | |
| Plaintiff | : | |
| v. | : | Civil No. RDB-07-1603 |
| | : | |
| AARON NUDELL, ET AL., | : | |
| | : | |
| Defendants | : | |

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O R D E R

For the reasons stated in the foregoing Memorandum Opinion, IT IS this 30th day of July 2008, HEREBY ORDERED that

1. Defendants' Motion to Dismiss Under Rule 12(b)(6) or, in the Alternative, for Dismissal or Stay Pending Primary Jurisdiction Referral (Paper No. 62) is DENIED;

2. Defendants' Motion for a Temporary Restraining Order and Preliminary Injunction (Paper No. 63) is DENIED; and

3. The Clerk transmit a copy of this Order and the accompanying Memorandum Opinion to all counsel.

/s/
RICHARD D. BENNETT
United States District Judge